

EXPLANATORY STATEMENT

Australian Meat and Live-stock Industry Act 1997

Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018

Legislative Authority

Paragraph 17(1)(a) of the *Australian Meat and Live-stock Industry Act 1997* (the Act) provides that the Secretary may, by legislative instrument, make orders to be complied with by holders of export licences. Paragraph 17(5)(a) of the Act provides that an export licence is subject to the condition that the holder of the licence must comply with orders made under section 17.

Purpose

The purpose of the *Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018* (the instrument) is to impose additional conditions on holders of export licences who export sheep by sea to the Middle East, as defined in circumstances where the vessel on which the sheep are being transported will travel through waters in the Arabian Sea north of latitude 11° N at any time during the voyage between May and October, which are the hottest months of the year in the northern hemisphere. In practice, the order will apply to all voyages to the Persian Gulf and those that travel to, or through, the Red Sea during that time of the year.

These conditions are intended to place a greater imperative on sheep export licence holders to adopt and implement actions that protect the health and welfare of sheep while travelling to the Middle East between May and October.

The instrument will provide a legal basis for the implementation of several recommendations of the *Independent Review of Conditions for the Export of Sheep to the Middle East during the Northern Hemisphere Summer* by Dr Michael McCarthy (the McCarthy Review) and measures to facilitate access to the Government's live animal export whistleblower hotline initiative.

Background

The Act is part of the regulatory framework that enables the Australian Government to regulate the export of live-stock from Australia. The Act also provides the basis for achieving specific animal welfare outcomes for live-stock exports.

In April 2018, footage was released showing live sheep in severe heat stress while being transported to the Middle East. The McCarthy Review was announced by the Minister for Agriculture and Water Resources on 10 April 2017 as part of the Government's response to the incident. The McCarthy Review was published on 17 May 2018.

The McCarthy Review included a number of recommendations relating to stocking density, ventilation and thermoregulation of sheep during shipping to the Middle East between May and October. This instrument will provide a legal basis for many of these recommendations.

Impact and Effect

This instrument will prohibit the export of sheep (in the circumstances where this instrument applies) unless the holder of a sheep export licence complies with the conditions it imposes.

The instrument will provide that the following conditions must be complied with:

- the minimum stocking density of sheep must be determined by either the allometric formula specified in this order, or a Heat Stress Risk Assessment Model, whichever provides the largest amount of pen space per animal;
- the pen air turnover of any vessel transporting sheep must be independently verified and records relating to the verification must be made, retained and provided to the Secretary of the Department of Agriculture and Water Resources and to the Australian Livestock Export Corporation Ltd (LiveCorp);
- a heat stress management plan must be in place by each exporter for each voyage;
- Kuwait must be the first port of unloading for the vessel, if it is one of the places where the vessel is unloading;
- the vessel must be equipped with automatic live-stock watering systems, the operation of which has been validated by the Australian Maritime Safety Authority (AMSA), and with water receptacles must at a height suitable for sheep;
- the required amount of bedding is provided; and
- approved whistleblower hotline posters must be displayed in accordance with requirements approved in writing by the Secretary.

These conditions are intended to place a greater imperative on sheep export licence holders to adopt and implement actions that protect the health and welfare of sheep while travelling to the Middle East between May and October.

Consultation

Key stakeholders engaged with Dr McCarthy during his review.

Details/Operation

Details of the instrument are set out in [Attachment A](#).

The instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in [Attachment B](#).

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018

Part 1 Preliminary

Section 1 Name

Section 1 provides that the instrument is the *Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018*.

Section 2 Commencement

Section 2 provides that the instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 Authority

Section 3 provides that the authority for making the instrument is section 17 of the Act.

Section 4 Schedules

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items on the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 5 Definitions

Section 5 defines a number of terms for the purposes of the instrument.

Section 6 Application of this instrument

Subsection 6(1) provides that the instrument will apply in relation to sheep that are exported, or are to be exported from Australia by sea between May and October in the circumstances set out under paragraphs 6(1)(a) and 6(1)(b).

Paragraph 6(1)(a) provides that this instrument will apply if the vessel transporting the sheep leaves Australia after the commencement of the instrument. This provision makes it clear that the instrument does not apply to an export which occurred before the commencement date. This will avoid unintended interaction between this instrument and a condition on a licence or direction given to a licence holder that may have been in place before the commencement of this instrument.

Paragraph 6(1)(b) provides that the instrument will only apply if the vessel transporting the sheep will travel, or travels, through waters in the Arabian Sea north of latitude 11°N during any part of the voyage. This provision provides that the instrument applies to voyages putting sheep in this geographical area during the hottest months of the year (May to October), irrespective of whether the destination of the voyage is a place in the Middle East or if the voyage passes through this area. In practice, the order will apply to all voyages to the Persian Gulf and those that travel to, or through, the Red Sea during that time of the year.

Subsection 6(2) provides that the instrument will apply whether or not the vessel is transporting other kinds of live-stock, in addition to sheep. This will ensure that the conditions imposed by this order to protect the health and welfare of sheep will be applied to all voyages carrying sheep, irrespective of the presence of other live-stock.

Part 2 Export Conditions

Section 7 Prohibition of export of sheep

Subsection 7(1) provides that the export of a consignment of sheep to which this instrument applies is prohibited unless the holder of a sheep export licence complies with the conditions in this instrument.

Note 1 after subsection 7(1) clarifies that the holder of a sheep export licence is subject to the condition that they must comply with this instrument unless an exemption has been granted and is in force under Part 3 of this instrument. It also directs the reader to paragraph 17(5)(a) of the Act.

Note 2 after subsection 7(1) provides that the holder of a sheep export licence may commit an offence if the holder either intentionally or recklessly contravenes a condition of a licence imposed under this instrument. It also directs the reader to subsection 54(3) of the Act, which provides for this offence.

Subsection 7(2) clarifies that nothing in this instrument is intended to limit a condition or restriction in the Australian Standards for the Export of Livestock (ASEL). However, to the extent of any inconsistency between such a condition or restriction and a condition in this instrument, this instrument prevails. This means that if the conditions or restrictions in both documents are different, and can both still be complied with, the holder of the sheep export licence must comply with both.

Section 8 General conditions

Section 8 sets out certain conditions that the holder of a sheep export licence must comply with before exporting a consignment of sheep.

Paragraph 8(a) provides that the holder of a sheep export licence must, before the sheep are exported, ensure that the pens in which the sheep will be transported are equipped with automatic live-stock watering systems.

Subparagraphs 8(a)(i) and 8(a)(ii) provide, respectively, that the automatic live-stock watering systems must have water receptacles at a height suitable for sheep and that details of those watering systems are set out in the record of equipment and arrangements attached to the Australian certificate for the carriage of livestock for the vessel issued by the Australian Maritime Safety Authority under Marine Order Part 43 (Cargo and cargo handling — livestock) 2018.

Paragraph 8(b) provides that the holder of a sheep export licence must, before the sheep are exported, ensure that there is a heat stress management plan in place for the voyage.

Paragraph 8(c) provides that the holder of a sheep export licence must, before the sheep are exported, ensure that at least 1 tonne of bedding for every 10,000 sheep will be provided on the vessel. Bedding may include, but is not limited to, materials such as straw, shavings or sawdust.

Section 8A Conditions relating to approved whistleblower hotline posters

Section 8A provides that the holder of a sheep export licence must, before the export of a consignment of sheep, be reasonably satisfied that posters approved by the Secretary (*approved whistleblower hotline posters*) are displayed in accordance with paragraphs 8A(a)-(c). This provision is intended to ensure that any person who may be concerned that a condition relating to the export of live sheep has been breached, is aware of the Government's live animal export whistleblower hotline to report their concerns.

Paragraph 8A(a) provides that the approved whistleblower hotline posters were displayed in accordance with requirements approved in writing by the Secretary, on all premises where sheep have been prepared or held after being transported from the farm where they were sourced, and before being loaded onto the vessel on which the sheep are to be transported. In practice, the requirement will be that posters are displayed at premises, such as a registered establishment, and the port where the sheep are loaded onto the vessel.

Paragraph 8A(b) provides that the approved whistleblower hotline posters were displayed in accordance with requirements approved in writing by the Secretary, on the vessel on which the sheep are to be transported before they were loaded onto the vessel.

Paragraph 8A(c) provides that the approved whistleblower hotline posters continue to be displayed in accordance with requirements approved in writing by the Secretary, on the vessel transporting the sheep until the sheep are unloaded from the vessel.

The note after paragraph 8A(c) provides that the approved whistleblower hotline poster and the approved requirements for its display are published on the Department's website (<http://www.agriculture.gov.au>).

Section 9 Conditions relating to pen air turnover

Subsection 9(1) sets out conditions relating to pen air turnover that the holder of a sheep export licence must comply with before exporting a consignment of sheep.

Paragraph 9(1)(a) provides that the pen air turnover for the vessel on which the sheep are to be transported must be verified by an independent qualified mechanical engineer within the five year period ending on the day before the sheep are to be exported.

Paragraph 9(1)(b) provides that the holder of the sheep export licence must ensure that the pen air turnover for the vessel has been verified by an independent qualified mechanical engineer if changes to the vessel have been made since the pen air turnover referred to in paragraph 9(1)(a) was verified, and the changes may affect the pen air turnover for the vessel.

Paragraph 9(1)(c) provides that the holder of the sheep export licence must take reasonable steps to satisfy himself or herself that the most recent verified pen air turnover for the vessel is correct. The purpose of this paragraph is to place an obligation on the holder of the sheep export licence to ensure that the verified pen air turnover is current.

Paragraph 9(1)(d) provides that the holder of the sheep export licence must make a record stating the information contained in subparagraphs 9(1)(d)(i-vi). This includes:

- the name of the vessel;
- that the pen air turnover for the vessel has been verified by an independent qualified mechanical engineer within the 5 year period ending on the day before the sheep are to be exported;
- the name and qualifications of the independent qualified mechanical engineer who carried out the most recent verification of the pen air turnover for the vessel;
- the method used to carry out the most recent verification;
- the date the pen air turnover was most recently verified;
- the results of the most recent verification.

Paragraph 9(2)(a) provides that the holder of the sheep export licence must give a copy of the most recent verification of the pen air turnover for the vessel and the method used to carry out the verification to the Secretary of the Department of Agriculture and Water Resources,

Paragraph 9(2)(b) provides that the holder of the sheep export licence must give the Australian Livestock Export Corporation Ltd (LiveCorp) a written notice stating the most recent verified pen air turnover for the vessel. LiveCorp manages the Heat Stress Risk Assessment Model.

Subsection 9(3) provides that the notices required by subsection (2) must be given as soon as practicable after the most recent verification of the pen air turnover for the vessel has been carried out.

Section 10 Conditions relating to pen space area for each sheep

Section 10 sets out conditions that the holder of a sheep export licence must comply with relating to the minimum pen space area for each sheep on a vessel during transport.

Subsection 10(1) provides that before the holder of a sheep export licence exports a consignment of sheep, the holder must ensure that the pen space on the vessel on which the sheep are to be transported, for each sheep (the *relevant sheep*) in the consignment, is an area, in square metres, of at least the greater of the value calculated under paragraphs 10(1)(a) or 10(1)(b). That is, the minimum pen space for each sheep on a vessel must be determined according to whichever calculation provides the sheep with the largest amount of pen space per animal. This calculation is subject to subsection 10(4), which sets out an additional requirement for determining pen space area for horned rams.

Paragraph 10(1)(a) refers to the value calculated in subsection 10(2). Paragraph 10(1)(b) refers to the value produced by the Heat Stress Risk Assessment Model for the voyage, which takes into account the most recent verified pen air turnover for the vessel.

Subsection 10(2) provides the allometric method for calculating minimum pen space. The formula is:

$$k(W + C + (G \times D))^{0.66}$$

where:

C is the applicable curfew factor for each sheep, which is:

(a) if the sheep has not been provided with food or water for 3 or more hours before being transported from the registered premises where it was prepared for export—12% of **W**;
or

(b) in any other case—0.

D is the number of expected days of the voyage before the vessel reaches the first port where some, or all, of the sheep will be unloaded from the vessel.

G is the daily weight gain factor of 0.04 kilograms.

k is 0.033.

W is the weight, in kilograms, of each sheep measured after, or at the time, the sheep was transported from the registered premises where it was prepared for export and before it was loaded onto the vessel.

Subsection 10(3) provides the method for determining the weight and applicable curfew factor for producing the value for each sheep using the Heat Stress Risk Assessment Model under paragraph 10(1)(b). Paragraph 10(3)(a) provides that the weight of each sheep must be the same as the weight used in the calculation of the value for each sheep under subsection 10(2). Paragraph 10(3)(b) provides that the curfew factor, if applicable, must be the same as the curfew factor used in the calculation of the value under subsection 9(2). The purpose of subsection 10(3) is to ensure that the inputs to the allometric model in subsection 9(2) and the Heat Stress Risk Assessment Model are consistent and the outcome is correct.

Subsection 10(4) provides that if the relevant sheep is a horned ram, the holder of the sheep licence must ensure that the minimum pen space on the vessel, for each horned ram is an area in square metres, of at least the greater of the values calculated under paragraphs (1)(a) and (b) plus an additional 10% of the greater value. This ensures that adequate space is taken into account for horned rams, as they require additional space. The 10% loading is consistent with the requirements of ASEL.

Section 11 Conditions relating to exports to Kuwait

Section 11 imposes conditions on the holder of a sheep export licence in relation to exports to Kuwait.

Subsection 11(1) provides that this section applies in relation to the holder of a sheep export licence who wishes to export a consignment of sheep to which this instrument applies if Kuwait is one of the destination places of the vessel on which the sheep are to be transported.

Subsection 11(2) provides that the holder of the sheep export licence must ensure that if Kuwait is one of the destination places of the vessel (whether this was known before or after the vessel left Australia) — Kuwait is the first port of unloading for the vessel. This requirement was recommendation 22 of the McCarthy Review.

Subsection 11(3) provides that section 11 applies in relation to the holder of the sheep export licence regardless of whether the holder became aware, before or after the vessel left Australia, that Kuwait would be a destination place for the vessel.

Section 12 Power or requirement to do or cause a thing to be done

Section 12 provides that if the holder of a sheep export licence has the power, or is required, under this instrument to do a thing, the holder is taken to have done the thing if the holder causes another person to do the thing on behalf of the holder. A note after section 12 provides an example, that if the holder of a sheep export licence subcontracts to service providers, the holder would be responsible for instructing the provider to comply with this instrument.

Part 3 Exemptions

Section 13 Application for exemption

Subsection 13(1) provides that the holder of a sheep export licence may apply to the Secretary at any time for an exemption from one or more provisions of this instrument in relation to a consignment of sheep to which the instrument applies.

Paragraph 13(2)(a) provides that an application must be made in a manner approved by the Secretary. Paragraph 13(2)(b) provides that if the Secretary has approved a form for making an application, an application must include all information required by the form. Paragraph 13(2)(c) provides that an application must set out the basis on which the exemption is sought.

A note after subsection 13(2) provides that a person may commit an offence if the person makes a false or misleading statement in an application or provides false or misleading information or documents, and refers the reader to sections 136.2, 137.1 and 137.2 of the *Criminal Code*.

Subsection 13(3) provides that an application is taken not to have been made if the application does not comply with the requirements referred to in subsection 13(2). This makes it clear that the Secretary will not be required to make a decision on an application if it is incomplete (notwithstanding that the Secretary is not obliged to make a decision in any case under subsection 14(1) of this instrument).

Section 14 Secretary may decide whether to grant exemption

Secretary may decide whether to grant exemption

Subsection 14(1) provides that on receiving an application for an exemption under section 13 of this instrument, the Secretary may decide to grant, or not grant, the exemption. If the Secretary does not make a decision, no exemption is given. In this circumstance, the applicant must continue to comply with all provisions of this instrument.

A decision to grant or not grant an exemption is about determining the circumstances in which it is acceptable to exclude a consignment of goods from the requirements of the legislation. The Secretary may only grant an exemption if he or she is satisfied that it is appropriate to do so, and it is likely that exemptions will only be granted in exceptional circumstances.

Decisions about whether to grant or not grant an exemption from one or more provisions of the instrument are based on whether animal health and welfare can be protected if an exemption is granted. The impact of such a decision may have implications beyond the interests of the individual exporter, including adversely impacting trading partners' confidence in the Australian Government's regulatory oversight of exported goods. This in turn may affect the interests of the entire sheep export industry. As such, a decision to provide an exemption must be solely at the discretion of the Secretary in circumstances the Secretary considers appropriate.

Decisions made under subsection 14(1) are not suitable for independent merits review because, due to the particular circumstances in which such decisions are made, there would be no appropriate remedy. For example, in circumstances where a consignment of sheep has already been loaded onto a vessel, merits review would not result in a suitable remedy. In this case, if an exemption was not granted before sheep departed to the Middle East, the Secretary may subsequently grant an exemption if a vessel loaded with sheep is unable to undertake an action required by the instrument, due to an extreme and unforeseeable event that could compromise the welfare of the sheep. In these circumstances, the urgency to grant an exemption justifies the exclusion of merits review, as uncertainty could compromise the welfare of the sheep while the decision was being reviewed. In circumstances where an exemption is not granted, the holder of an export licence is not prevented from making a new application for exemption.

A note after subsection 14(1) provides that an application that does not comply with the requirements under subsection 13(2) of the instrument is taken not to have been made, and refers the reader to subsection 13(3) of the instrument. This makes it clear that the Secretary will not be required to make a decision on an application that is incomplete.

Secretary may request further information or documents

Subsection 14(2) will provide that for the purposes of making a decision in relation to an application submitted under section 13 of this instrument, the Secretary may make a written request that an applicant give further specified information or documents. This is in addition to the information or documents required by section 13 of this instrument. This is intended to ensure that the Secretary is able to obtain all relevant information to determine whether it is appropriate to grant an exemption.

Grounds for granting exemption

Subsection 14(3) will provide that the Secretary may grant an exemption if satisfied, having regard to any matter the Secretary considers relevant, that it is appropriate to grant the exemption.

Enabling the Secretary to take into account any matter he or she considers relevant will provide the Secretary with the flexibility to determine when it is appropriate to allow an exemption. This reflects the importance of ensuring animal health and welfare is maintained

if an exemption is granted, and that the circumstances that must be taken into account will be specific to the consignment to which the exemption relates and may be difficult to foresee.

Exemption may be granted subject to conditions

Subsection 14(4) will enable the Secretary to grant an exemption under paragraph 14(1)(a) subject to any conditions that the Secretary considers necessary.

Providing the Secretary with the discretion to set any conditions necessary will ensure that an exemption that relates to a particular consignment is appropriate to protect the health and welfare of sheep in the consignment. This broad discretion is required as the kinds of conditions that are necessary will be specific to each consignment and may be difficult to foresee.

A note after subsection 14(4) provides that the exemption may be revoked if conditions are not complied with. If an exemption is revoked, a holder of a sheep export licence must comply with all provisions of this instrument.

Section 15 Notice of decision

Instrument of exemption

Subsection 15(1) provides that if the Secretary grants an exemption under paragraph 14(1)(a) of this instrument, the Secretary must give the applicant an instrument of exemption. The instrument of exemption must set out any conditions imposed under subsection 14(4) of this instrument.

The instrument of exemption under subclause 15(1) is not intended to be a legislative instrument for the purposes of the definition of legislative instrument provided for by section 8 of the *Legislation Act 2003*. The exemption will be limited to a consignment of sheep that belongs to an individual holder of a sheep export licence.

Notice of refusal

Subsection 15(2) provides that if the Secretary decides not to grant an exemption under paragraph 14(1)(b) of this instrument, the Secretary may notify the applicant in writing and provide reasons for the decision to refuse to grant the exemption. The Secretary is not obliged to give a notice of decision. If an exemption is not granted, the applicant must continue to comply with all provisions of this instrument.

Section 16 Effect of exemption

Section 16 provides that if the holder of a sheep export licence is granted an exemption under paragraph 14(1)(a) from one or more provisions of the instrument (the *exempted provisions*) in relation to a consignment of sheep, the exempted provisions do not apply to the export of that consignment while the exemption is in force.

However, any provision that is not an exempted provision will continue to apply to the export of that consignment. An exemption that has been revoked for non-compliance with a condition will cease to apply.

Schedule 1 – Repeals

Item 1 repeals the *Australian Meat and Live-stock industry (Export of live-stock to Saudi Arabia) Order 2005*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018* (the Legislative Instrument) will impose conditions on holders of an export licence who export sheep by sea to the Middle East, as defined in circumstances where the vessel on which the sheep are being exported will travel in the Arabian Sea north of latitude 11° N at any time during the voyage between May and October, which are the hottest months of the year in the northern hemisphere. These conditions are intended to protect the health and welfare of the sheep during export.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Daryl Quinlivan
Secretary of the Department of Agriculture and Water Resources